

# LEGAL GUIDE

Effective April 1, 2006, Michigan Compiled Law (MCL) 400.734b requires fingerprint background checks for all individuals seeking employment or an independent contract with an adult foster care facility. This law prohibits individuals convicted of certain offenses from having regular, direct access to residents, or their records, and from providing direct services to the residents of an adult foster care facility.

Effective April 1, 2006, MCL 333.20173a requires fingerprint background checks for all individuals seeking employment, an independent contract, or clinical privileges with a home for the aged facility. This law prohibits individuals convicted of certain offenses from having regular, direct access to residents, or their records, and from providing direct services to the residents of a home for the aged facility.

The intent of these laws is to protect the vulnerable adult population residing in these facility types. Please review the following sections carefully when reviewing criminal background checks.

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## **Permanent Exclusions (Federal Law)**

MCLs 400.734b(1)(a) and 333.20173a(1)(a) require permanent exclusion for the offenses described under Federal law 42 USC 1320a-7a.

42 USC 1320a-7a mandates permanent exclusion for all of the following:

1. Conviction of program-related crimes  
Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter or under any State health care program.
2. Conviction relating to patient abuse  
Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.
3. Felony conviction relating to health care fraud  
Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service, or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.
4. Felony conviction relating to controlled substances  
Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

42 USC 1320a-7(i) defines “conviction” as:

1. when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;
2. when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
3. when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or

4. when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

**What this means:**

If an individual or entity was convicted of one of the above described offenses, and that conviction appears on their record at the time of their criminal background check, a permanent exclusion is required under this Federal law. **There are no exceptions.** Regardless of whether the judgment was deferred, the sentence was delayed, or the case was even subsequently dismissed or expunged following the individual's background check, **a permanent exclusion is required.**

## 15 Year Exclusions (Felony)

MCLs 400.734b(1)(b) and 333.20173a(1)(b) require exclusion for **15 years from the time an individual's sentencing was completed** for any of the felonies listed below, an attempt or conspiracy to commit those felonies, or any other state or federal crime that is similar to the felonies described below.

- i. A felony that involves the intent to cause death or serious impairment of a body function that results in death or serious impairment of a body function, that involves the use of force or violence, or that involves the threat of the use of force or violence.  
  
This includes, but is not limited to, felony murder, attempted murder, and felonious assault or domestic violence.
- ii. A felony involving cruelty or torture.
- iii. A felony under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r (vulnerable adult abuse).
- iv. A felony involving criminal sexual conduct.
- v. A felony involving abuse or neglect.
- vi. A felony involving the **use** of a firearm or dangerous weapon. (This does not include carrying a concealed weapon.)
- vii. A felony involving the diversion or adulteration of a prescription drug or other medications.

Sentencing terms include, but are not limited to, jail/prison time, probation, and parole.

## **10 Year Exclusions (Felony)**

MCLs 400.734b(1)(c) and 333.20173a(1)(c) require exclusion for **10 years from the time an individual's sentencing was completed** for any felony, or an attempt or conspiracy to commit a felony, not mentioned in the previous sections.

**What this means:** Any felony conviction, or an attempt or conspiracy to commit a felony, excludes an individual from employment for a minimum of 10 years from the time their sentencing was completed.

# Attempted Felonies

When reviewing an individual's criminal record, be aware of convictions that begin with the word 'attempt'. You will be able to spot attempted felonies easily if a conviction begins with 'attempt- felony'. Review the conviction a little more closely if it begins with 'attempt- misdemeanor'. Note the MCL number, and go to [www.legislature.mi.gov](http://www.legislature.mi.gov). Enter the MCL number in the box labeled 'MCL Section' and click 'search'.

The screenshot shows the Michigan Legislative Website interface. At the top, there is a header with the Michigan State Capitol dome and the text "MICHIGAN LEGISLATIVE WEBSITE" and "Michigan Compiled Laws Complete Through PA 267 & includes 269-277 of 2013". Below the header is a navigation bar with links: Home, Register, Why Register?, Login, News, Help.

The main content area is divided into several sections:

- Welcome!**: A free service of the Michigan Legislative Council, the Michigan House of Representatives, and the Michigan Senate.
- Recent Activity**: (current news cycle has 113 items)
  - SB 0146 of 2013 Economic development; neighborhood enterprise zones; neighbo... **Last Action: 1/22/2014 - referred to second reading**
- Legislative Bill Search for 2013-2014 Session**:
  - Bill Number**: Search box with examples (ex. "4001" or "4001-4005").
  - Bill Content**: Search box with example (ex. "environment").
  - Bill Category**: Dropdown menu with "Please Select a Category (2013-2014)" and a "Search" button. Example text: (ex. select 'weapons' to show related bills even if 'weapons' is not found in the text of the bill.)
- Michigan Compiled Laws Search**:
  - MCL Section**: Search box with examples (ex. "2.29" or "8.40-8.50"). A red arrow points to this box.
  - MCL Content**: Search box with example (ex. "tenant").
- Legislative Activity**:
  - Today's Calendars
  - Today's House Meetings
  - Today's Senate Meetings
  - House Audio/Video
  - Senate Audio/Video
  - Recent Bill Activity
  - Daily Intro/Passed/Enrolled
- How do I...**:
  - ...get notified when a bill status changes?
  - ...find a Public Act?
  - ...find a bill from a prior session?
  - ...get help when I can't find what I'm looking for? more...
- Related Sites**:
  - Michigan House
  - Contact your Representative
  - Michigan Senate
  - Contact your Senator

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Read through the text of the MCL section to determine if it is a misdemeanor or felony offense.


### Section 750.81d

 [friendly link](#)  [Printer Friendly](#)

#### THE MICHIGAN PENAL CODE (EXCERPT) Act 328 of 1931

**750.81d Assaulting, battering, resisting, obstructing, opposing person performing duty; felony; penalty; other violations; consecutive terms; definitions.**

Sec. 81d.

(1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both. 

If the MCL section refers to a felony offense, it is considered to be an “attempt to commit a felony”. Read through the sections above to determine if the individual is eligible for employment.

If the MCL section refers to a misdemeanor offense, it is not considered to be an “attempt to commit a felony”. Read through the sections below pertaining to misdemeanors to determine if the individual is eligible for employment.

Here is a list of some of the most common attempted felonies seen on individuals’ background checks:

- Attempt- misdemeanor check/no account
- Attempt- misdemeanor check- 3 NSF checks within 10 days
- Attempt- misdemeanor controlled substance- possession/analogues
- Attempt- misdemeanor larceny in a building
- Attempt- misdemeanor police officer- assaulting/resisting/obstructing
- Attempt- misdemeanor police officer- penal code- fleeing/eluding
- Attempt- misdemeanor police officer- motor vehicle code- fleeing/eluding

Please keep in mind this list is not exhaustive.

Review the MCL section carefully to determine if the offense is a misdemeanor or a felony. If it is not clear, please contact the Department of Human Services Workforce Background Check Hotline at 1-877-718-5542 for further clarification.



## 10 Year Exclusions (Misdemeanor)

MCLs 400.734b(1)(d) and 333.20173a(1)(d) require exclusion for **10 years from the date of conviction** for any of the following misdemeanors, or a state or federal crime (including ordinance violations) that is substantially similar to the following misdemeanors:

- i. A misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury, or a misdemeanor involving the use of force or violence or the threat of the use of force or violence.
- ii. A misdemeanor under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r (vulnerable adult abuse).
- iii. A misdemeanor involving criminal sexual conduct.
- iv. A misdemeanor involving cruelty or torture unless the individual was less than 16 years of age at the time of conviction.
- v. A misdemeanor involving abuse or neglect.

## 5 Year Exclusions (Misdemeanor)

MCLs 400.734b(1)(e) and 333.20173a(1)(e) require exclusion for **5 years from the date of conviction** for any of the following misdemeanors, or a state or federal crime (including ordinance violations) that is substantially similar to the following misdemeanors:

- i. A misdemeanor involving cruelty if committed by an individual who is **less than 16 years of age**.
- ii. A misdemeanor involving home invasion- This includes misdemeanor breaking and entering.
- iii. A misdemeanor involving embezzlement.
- iv. A misdemeanor involving negligent homicide or a moving violation causing death.
- v. A misdemeanor involving larceny if committed by an individual who is **16 years of age or older**.
- vi. A misdemeanor of retail fraud in the second degree if committed by an individual who is **16 years of age or older**.
- vii. A misdemeanor involving:
  - a. **Assault**- This includes, but is not limited to, domestic violence, assault and battery, and aggravated assault.
  - b. **Fraud**- This includes, but is not limited to, non-sufficient funds check, false pretenses, financial transaction device, false report of a misdemeanor, false prescription, welfare fraud, and unemployment compensation fraud.
  - c. **Theft**- This includes, but is not limited to, receiving and concealing stolen property, failure to return rented property, theft detection device-tampering/removal, removing property not own, shoplifting, and breaking and entering a vehicle with intent to steal property.
  - d. **Possession or delivery of a controlled substance**

## 3 Year Exclusions (Misdemeanor)

MCLs 400.734b(1)(f) and 333.20173a(1)(f) require exclusion for **3 years from the date of conviction** for any of the following misdemeanors, or a state or federal crime (including ordinance violations) that is substantially similar to the following misdemeanors:

- i. A misdemeanor involving assault if there was no use of a firearm or dangerous weapon and no intent to commit murder or inflict great bodily injury (simple assault).
- ii. A misdemeanor of retail fraud in the third degree if committed by an individual who is **16 years of age or older**.
- iii. A misdemeanor under part 74 of the public health code, 1978 PA 368 if committed by an individual **18 years of age or older**. This is any misdemeanor conviction under MCL 333.7401 to 333.7461. The most common convictions are possession/use of marijuana.

## **1 Year Exclusions (Misdemeanor)**

MCLs 400.734b(1)(g) and 333.20173a(1)(g) require exclusion for **1 year from the date of conviction** for any of the following misdemeanors, or a state or federal crime (including ordinance violations) that is substantially similar to the following misdemeanors:

- i. A misdemeanor under part 74 of the public health code, 1978 PA 368 if committed by an individual **under the age of 18.** This is any misdemeanor conviction under MCL 333.7401 to 333.7461. The most common convictions are possession/use of marijuana.
- ii. A misdemeanor for larceny or retail fraud in the second or third degree if committed by an individual **under the age of 16.**

## **Permanent Exclusions (State Law)**

MCLs 400.734b(1)(h) and 333.20173a(1)(h) require permanent exclusion if an individual is the subject of an order or disposition under section 16b of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.16b (**not guilty by reason of insanity**).

MCLs 400.734b(1)(i) and 333.20173a(1)(i) require permanent exclusion if an individual has been the subject of a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency according to an investigation in accordance with 42 USC 1395i-3 or 1396r.

## **“Conviction” as Defined Under State Law**

MCLs 400.734b(18)(a)(i) and 333.20173a(15)(b)(i) define conviction (for an offense that does not fall under the Permanent Exclusions [Federal Law]) section as:

A final conviction, the payment of a fine, a plea of guilty or nolo contendere (no contest) if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the juvenile division of probate court or family division of circuit court for a violation theft if committed by an adult would be a crime.

**What this means:** Regardless of the status of the case (delayed sentence, deferred judgment or adjudication, etc.), if it is a public case, **it is considered to be a conviction if one of the above criteria is met.** If the case is subsequently dismissed or expunged, it is the excluded individual’s responsibility to submit an appeal to the Department of Human Services for review.

For a relevant crime described under 42 USC 1320a-7a (see section for Permanent Exclusions [Federal Law]). MCLs 400.734b(18)(a)(ii) and 333.20173a(15)(b)(ii) define conviction as the term is defined in 42 USC 1320a-7a.

# Appeals

All individuals have the right to appeal their exclusion. If appealing, the individual must be able to do one of the following:

- Substantiate an inaccuracy in their record. For example, the final charge may have been reduced or amended to an offense that is not exclusionary. Or, perhaps the court made an error entering the information, and the information presented on the record is inaccurate.
- Substantiate the conviction has been set aside or expunged from their criminal record.
  - This **does not** apply to convictions under federal law 42 USC 1320a-7a, unless they can substantiate the conviction was set aside or expunged prior to their fingerprint submission.
  - **If the individual states their case has been closed, it does not necessarily mean the case has been set aside or expunged.** The court documentation must explicitly state the case has been set aside or expunged.
- If convicted prior to April 1, 2006, the individual may be eligible to be 'grandfathered in' if they can substantiate their employment in long term care prior to April 1, 2006. (NOTE: This does not apply to convictions under federal law 42 USC 1320a-7a.) The individual must be able to provide a copy of their W2, check or pay stub, or a letter from the employer on letterhead as proof of employment.

To file an appeal, the individual must submit their completed appeal form (see page 15) and supporting documentation. If the individual misplaced or did not receive their appeal form, they can find the form under "Information" at [www.miltcpartnership.org](http://www.miltcpartnership.org). Print the DHS Appeal Form. Documentation can be submitted to the address on the appeal form.



**LONG TERM CARE WORKFORCE BACKGROUND CHECK**  
**REQUEST FOR APPEAL/RECONSIDERATION**



**Your Contact Information – Please complete the following:**

Name:		Employer:	
Telephone:		Email:	
Street Address:			
City:	State:	ZIP:	
<p><b>Appeal:</b> An appeal may only be filed if the criminal history record is inaccurate or if the conviction has been expunged or set aside. Please check the appropriate box.</p> <p><input type="checkbox"/> There is an inaccuracy in my criminal history. I am attaching a copy of the judgment of sentence or other documents showing that the record has been corrected.</p> <p><input type="checkbox"/> My conviction has been expunged or set aside. I am attaching a certified copy of the order to set aside or similar proof of expunction.</p> <p><input type="checkbox"/> Please reconsider my employment disqualification. My conviction occurred before April 1, 2006, and I have worked in long term care before April 1, 2006.</p> <p><b>Reconsideration:</b> Applicants/employees may be “grandfathered” under the background check laws if the disqualifying conviction occurred before April 1, 2006, and if they are able to document a history of employment for a licensed long term care facility/agency or AFC before April 1, 2006 (may not apply to all disqualifications). The department will reconsider the disqualification upon receipt of supporting documentation that may include:</p> <ul style="list-style-type: none"><li>• a statement from an employer or authorized representative, on company letterhead, that the applicant/employee was employed in long-term care prior to April 1, 2006, or</li><li>• a copy of a pay stub or W-2 form showing the facility/agency or AFC name and dated before April 1, 2006.</li></ul> <p><input type="checkbox"/> Please send a copy of the results of my appeal/reconsideration to the above -named employer.</p> <ol style="list-style-type: none"><li>1. Sign and date this form.</li><li>2. Attach documents that support your appeal or reconsideration request. We will not be able to process your appeal or reconsideration request without documentation.</li></ol> <p>Mail the form and documents to:</p> <p style="margin-left: 40px;"><b>Michigan Department of Human Services</b> <b>Bureau of Children &amp; Adult Licensing</b> <b>AFC/ HFA Background Check Unit</b> <b>7109 W. Saginaw St, 2nd Floor</b> <b>P.O. Box 30650</b> <b>Lansing, Michigan 48909</b></p>			
Signature		Date	

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DCIS-1415 (4/25/11)

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The Department will review the appeal and issue a written decision within 30 business days of receiving the appeal (MCL 400.734c, MCL 20173b(1)).

When the Department has made a decision on the individual's appeal, a written decision will be sent to the individual and their employer if the individual chooses. If the individual chooses to have the Department notify the licensee as well, you will receive an email to log into the background check website to view the decision and select your final hiring decision.